SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

JAMES RUMSEY,

Petitioner,

-vs-

HAROLD J. CARDWELL, Warden,
Arizona State Penitentiary,

Respondent.

NO. 73-1767

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

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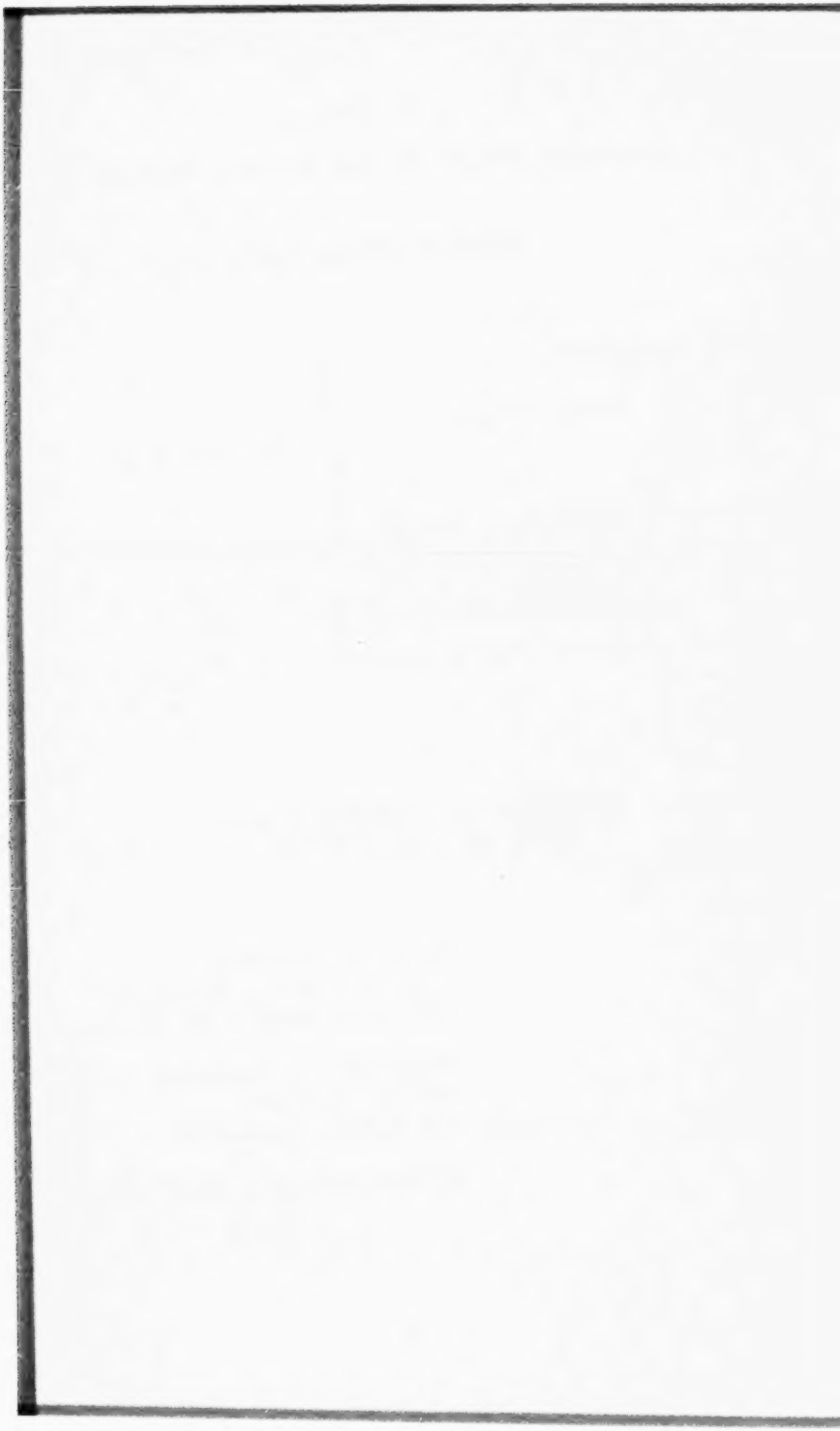

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## QUESTIONS PRESENTED

I. DID THE PETITIONER RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL?

II. WERE THE FINDINGS OF THE COURTS BELOW THAT PETITIONER VOLUNTARILY ENTERED HIS GUILTY PLEAS SUPPORTED BY THE RECORD?

III. DID THE CIRCUMSTANCES UNDER WHICH THE SUPREME COURT OF ARIZONA AFFIRMED PETITIONER'S CONVICTION DENY HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW?

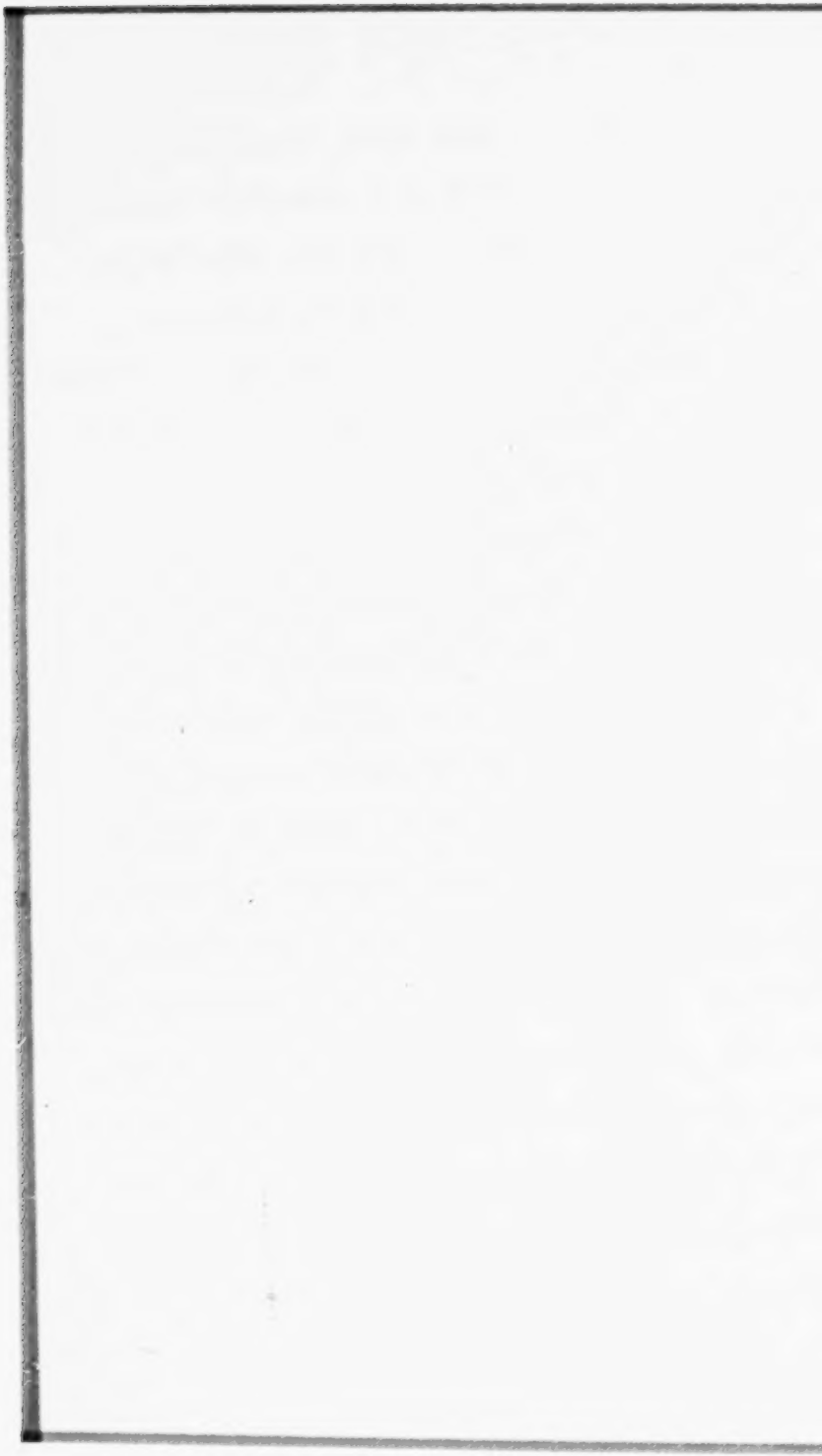
## STATEMENT OF THE CASE

Respondent would accept petitioner's Statement of the Case, subsection (A) regarding the proceedings in the courts below. Respondent's acceptance of subsection (A), however, wherein it states that the District Court granted a certificate of probable cause does not mean that respondent in any manner whatsoever agrees that there were any valid grounds for appeal. Respondent expressly rejects the remainder of

petitioner's Statement of the Case and puts every remaining statement therein in issue.

At the evidentiary hearing in this matter, Dr. Tuchler, a psychiatrist called by petitioner, stated that petitioner's personality was very passive during the time surrounding the charges in question. The doctor also stated that, except for this incident, he never saw petitioner from 1959 to 1963 or 1964 (R.T. 13-14). The doctor also stated that petitioner was never in the passive state of mind. During the times he had actually examined the appellant, he just assumed that such a state of mind developed (R.T. 48-49). Dr. Tuchler expressly said that petitioner could intellectually judge right from wrong (R.T. 35, 36). He also testified that it would be "difficult" to judge petitioner's state of mind by looking back from 1963 to 1961 as he was doing (R.T. p. 46). Dr. Tuchler further stated that petitioner had the ability in 1961 to discuss alternatives with

his attorney, to know what the death penalty was, that it existed as a possible penalty in his case and he would have the ability to discuss the facts of his case with his attorney. Dr. Tuchler also stated that petitioner's "passivity" was due to a number of factors including his parent's advice, his attorney's advice, the newspaper publicity about him and the death penalty and that this did imply some sort of judgment (R.T. 29, 41-42). Also pertinent to Dr. Tuchler's testimony regarding the petitioner's passive state is the fact that although Dr. Tuchler stated petitioner just returned the injured girl to her parents and waited for the police to come (R.T. 19), there is other evidence indicating that the keys were taken from his car and other actions taken by the victim's father so that he could not leave (Dt. Ct. Rec. p. 31).



Petitioner's second witness was his father who testified that petitioner did not just accept his father's decision to plead guilty but asked why he had come to that decision (R.T. 94), and that petitioner stated he did not "know what else we can do" (R.T. p. 94). Much of the father's testimony will be brought out infra in regard to petitioner's claims of ineffective assistance of counsel. However, petitioner's father did testify that he did not "recall" if the judge inquired about the voluntariness of the sentencing or not (R.T. 96). Petitioner's mother stated that she could not remember if any questions about voluntariness were asked at the sentencing (R.T. 127). The sentencing judge, however, stated he was certain he asked petitioner if he had anything to say or any legal cause why he should not pass sentence (R.T. 250). This judge also stated that the procedure he always followed when sentencing a case he was new to

was to be very cautious and that he tried to get the defendant to relax and always asked if any promises were made to the person being sentenced. He testified that he would not let the attorney answer for the defendant when asking if a plea was voluntary because it was "my responsibility" and he went along as if he did not know what other judges had done. (R.T. 250-255). He stated that his general practice in such cases was to make sure the defendant understood the charges and consequences of a guilty plea, and that after addressing the defendant personally, he would question his attorney to check more (R.T. pp. 241-243).

The police officer who first talked to Officer Bradley, testified that he and his partner had asked appellant if he wanted to call his parents or an attorney (R.T. 200-201). He testified that after a brief preliminary questioning period of about fifteen

to twenty minutes, he and his partner stopped questioning petitioner because the charges appeared serious, and they immediately called the county attorney on duty that night (R.T. 200, 202). The officer stated that he knew nothing about the facts of the case except as related by the petitioner, and that the case was still being investigated when he questioned petitioner (R.T. 198, 213-214). He stated that he believed petitioner's statements were voluntary because he knew that he had not promised petitioner anything, or threatened or coerced him (R.T. 212). He stated that he did not know petitioner had ever been hospitalized until the District Court evidentiary hearing (R.T. 211). He stated that petitioner did not write out any confession, and that petitioner was not shown a stack of open cases and asked if he had committed any of them (R.T. 207).

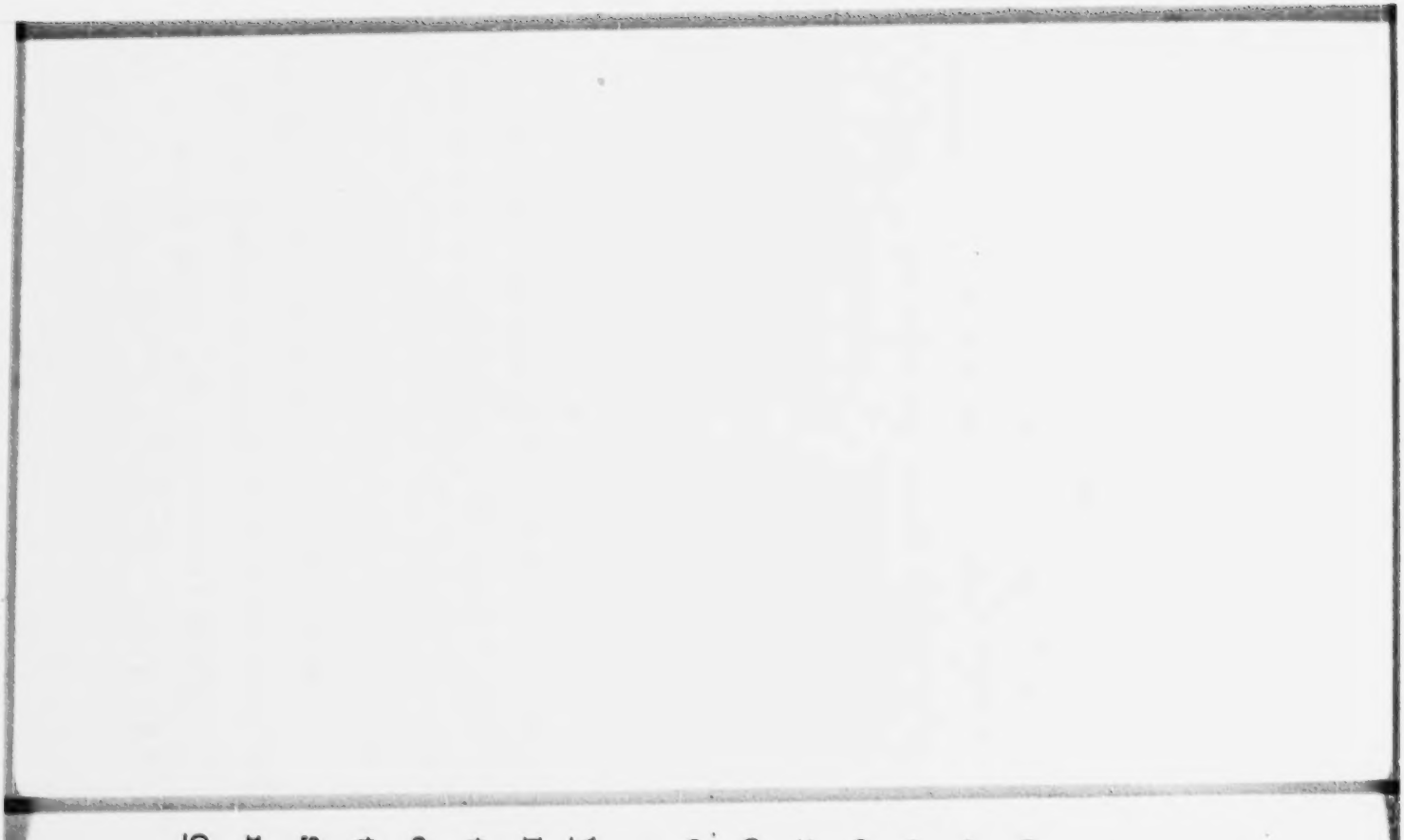
Mr. Roper, the County Attorney on duty, testified that he went to the station that night

with a court reporter and questioned petitioner (R.T. 218). He never made promises regarding sentences or treatment because he was not in a position to make such promises (R.T. 220, 234) and he was certain that petitioner had not written out a confession before he came, and that he did not write one while he was there (R.T. p. 228). He felt certain he asked petitioner if his statements were voluntary, of his own free will and not the result of coercion, threats, or promises (R.T. 220, 229-230, 235) that it was his "standard practice" to ask persons he was going to question if they had an attorney or wanted one and was fairly certain he had asked this of appellant (R.T. 222).

Finally, when petitioner testified he stated that he had waived the preliminary hearing because he knew about the confession and there was not any need to determine if a crime had been committed (R.T. 161).

And, the preliminary examination record expressly states that "defendant is informed of his right to aid of counsel" (Dt. Ct. Rec. p. 33). Petitioner then went on to testify that he pleaded guilty because he wanted hospital treatment not just because of what his father had said (R.T. 171) and that when the State Hospital returned him to prison (because of its decision, it could not help him), he went to the superintendent and told him the decision was wrong and that he still needed treatment (R.T. 178-179). Petitioner also testified that the guilty plea was "a decision that had to be made" because (1) there was no other place for him to go, and (2) to avoid the death penalty (R.T. 179-180).

He did not think about his plea and its voluntariness until after he talked to the "jailhouse lawyers" at the State Prison (R.T. 181).



## ARGUMENT

### I

### PETITIONER WAS PROVIDED EFFECTIVE ASSISTANCE OF COUNSEL.

Respondent contends that under Ninth Circuit tests for determining effective assistance of counsel the facts of this case are more than adequate to show that petitioner received effective assistance. Secondly, respondent would submit that the District Court's finding to this effect is not clearly erroneous.

The Ninth Circuit, in United States v. Valenzuela-Mendoza, 452 F.2d 773 (1972), has recently reiterated its rule that trial attorney's errors do not violate defendant's right to a fair trial unless they reduce the trial to a mockery or farce. Such a determination must be made from the record as a whole. Id. at 774; see Wright v. Craven, 412 F.2d 915, 917 (9th Cir. 1965);

United States v. Ragen, 166 F.2d 976, 980-981 (7th Cir. 1948); United States v. Silva, 418 F.2d 328, 331-332 (2d Cir. 1969); Slawek v. United States, 413 F.2d 957, 959 (8th Cir. 1969); O'Malley v. United States, 285 F.2d 733, 734 (6th Cir. 1961).

The Supreme Court has recognized that the decision to plead guilty is at best very risky and uncertain, and that mere mistakes by an attorney will not render his assistance ineffective as long as it is within the normal bounds of competency. McMann v. Richardson, 397 U.S. 759, 769-771, 90 S.Ct. 1441, 1448-1449, 25 L.Ed.2d 763, 772-773 (1970). Tollett v. Henderson, 411 U.S. 258, 267, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). A finding of denial of effective assistance of counsel is especially hard to establish when the gravamen of the defendant's claim is a tactical decision made by his attorney--(as appellee will show Mr. Later's decision was here).

See United States v. Moss, 438 F.2d 147, 149 (D.C. Cir. 1970); Morrison v. United States, 434 F.2d 532, 535 (D.C. Cir. 1970); Wright v. Craven, supra, at id., 718. Moreover, there is a presumption that an attorney is competent. See Kress v. United States, 411 F.2d 16, 22 (8th Cir. 1969); Busby v. Holman, 356 F.2d 75, 79 (5th Cir. 1966).

The petitioner argues that the Ninth Circuit standard for measuring effective assistance of counsel--reducing the proceedings to a farce or a mockery--is no longer applicable by virtue of a recent Sixth Circuit case, Beasley v. United States, 491 F.2d 687 (6th Cir. 1974) and two District of Columbia Circuit cases, Bruce v. United States, 379 F.2d 113 (D.C. Cir. 1967); and Scott v. United States, 427 F.2d 609 (D.C. Cir. 1970). In none of these cases, however, do the Courts flatly reject the use of the language "farce and mockery" for other courts. They

recognize that this language may be merely conclusionary, used by the courts to indicate that there is a heavy burden on the defendant to show the unfairness necessary to violate the Sixth and Fourteenth Amendments, thus recognizing that some Courts may use the words "farce or mockery" when in reality their standard is no lower than that used by the District of Columbia and Sixth Circuits. Beasley v. United States, supra at 696; Scott v. United States, supra, at 610; Bruce v. United States, supra, at 116.

It should be pointed out that what the Circuit Court in Beasley found as error in the District Court's use of a "farce and mockery" standard was a finding on one hand that "the petitioner's attorney had been incompetent and ineffective in several respects" and on the other hand that the petitioner received effective assistance of counsel because the attorney's incompetence has not reduced

the trial to a "mockery or a farce". Clearly, that District Court used the "farce and mockery" language to justify a lower than acceptable standard. The Ninth Circuit, however often it has used that language in its opinions, has never used it to justify a lower than acceptable standard after it found that an attorney was in fact incompetent and ineffective. United States v. Valenzuela-Mendoza, supra; Wright v. Craven, supra. Thus, the standard for effective assistance of counsel used by the Ninth Circuit does not conflict with the standard used by the District of Columbia and Sixth Circuits.

Even assuming arguendo that the Ninth Circuit standard is lower than that in other circuits, the assistance given to the petitioner by Later would be found effective under the alleged stricter standard. At the evidentiary hearing in District Court, it was brought out that during the two days after he was appointed to represent petitioner, Mr. Later

engaged in investigation, had a copy of petitioner's confession, a copy of the doctor's report and was thoroughly familiar with what had happened (R.T. 83). Mr. Later had represented about four persons charged with similar crimes and at least one of the charges against these persons had been dropped (R.T. 84). Mr. Later met with petitioner's father two to five times and did more research after or during these meetings that appellant's father knew of. Mr. Later originally intended to make a plea of not guilty by reason of insanity (R.T. p. 86). However, after discussing the insanity defense with the State Hospital superintendent, Mr. Later dropped his Rule 250 (incompetency commitment) motion because the superintendent's statements and that of several other psychiatrists, led him to decide that since there was a written (not hand written however--just that it was "written") confession it would be best to plead guilty and hope for a life sentence from the judge (R.T. 87-90). There

was testimony that Later had talked with petitioner at different "times" (R.T. 89; see R.T. 91-92). There was also testimony directly contradicting petitioner by his father that Mr. Later came in and talked to petitioner for about five minutes the day the decision to plead guilty was made (R.T. p. 93). At the sentencing proceedings, Mr. Later made a plea in mitigation of appellant's sentence (R.T. p. 97). Mr. Later knew the time for appeal and investigated by looking for possible errors but said he felt there were no grounds for reconsideration (p. 99). Before the guilty plea was made, Mr. Later talked with someone from the County Attorney's office and he went with petitioner's father to try to negotiate a plea or have prosecution wait until things had "cooled off" (R.T. pp. 113-115).

Thus, it is apparent that the assistance afforded petitioner here is far above the in-

competence necessary to find that the counsel was so ineffective as to make a "mockery" of justice or that counsel was not "counsel reasonably likely to render and rendering reasonably effective assistance". Beasley v. United States, supra. Indeed, there are divers examples of assistance by counsel far below that afforded petitioner here being found effective. See, e.g. United States v. Junne, 458 F.2d 1156, 1157-1158 (3rd Cir. 1972) (counsel appointed only two days before trial); Dukes v. Warden, 406 U.S. 250, 252-256, 92 S.Ct. 1551, 1512-1515, 32 L.Ed.2d 45, 49-52 (1972) (counsel representing different defendants advised petitioner to plead guilty and got other defendants off by saying petitioner led them into a life of crime held no conflict sufficient to find ineffective assistance); Chambers v. Maroney, 399 U.S. 42, 53-54, 90 S.Ct. 1975, 1982-1983, 26 L.Ed.2d 419, 429-430 (1970) (defendant not denied effective

assistance when first met attorney on way to courtroom); Doughty v. Beto, 396 F.2d 128, 130 (5th Cir. 1968)(no denial of effective assistance when defendant pleaded guilty after meetings of not more than fifteen minutes with defendant).

Thus, respondent submits the District Court's finding that appellant had effective assistance of counsel is not clearly erroneous and should be affirmed.

## ARGUMENT

### II

### THE FINDINGS BY THE COURTS BELOW THAT BURCHETT'S GUILTY PLEAS WERE VOLUNTARILY ENTERED WERE SUPPORTED BY THE RECORD.

Respondent submits that there is more than enough evidence in the record to uphold the District Court's decision that petitioner's plea was not coerced but "was involuntary only in the sense that under the circumstances created by petitioner's own criminal acts and the admissible strong evidence of such acts it was the realistic choice open to him" (Dt. Ct. Rec. p. 189-190). The court did not have to accept Dr. Tuchler's opinions about appellant's lack of volition. The record shows that petitioner asked his father why he thought he should plead guilty, he did not just accept his advice (R.T. p. 99). Petitioner pleaded guilty because there was no other place for him to go. And to avoid the death penalty--

as he said, "it was a decision that had to be made" (R.T. 179-180). Contrary to petitioner's claims, Dr. Tuchler did not say that petitioner could not make intellectual judgments; and the doctor added that petitioner had the ability to understand the death penalty (see R.T. 37-42). Despite petitioner's claims that he never talked to his attorney the day of the decision to plead guilty, petitioner's father said Mr. Later talked to petitioner about five minutes that day and that petitioner then decided to plead guilty (R.T. 93). Moreover, Dr. Tuchler twice said that part of the reason for petitioner's unvolitional acceptance of a guilty plea was because of his attorney's advice (R.T. 29-30, 44). The sentencing judge stated he was certain he asked the petitioner if he had anything to say or any legal cause why he should not pass sentence (R.T. 250). This judge also stated that the procedure he

always followed when sentencing a case he was new to was to be very cautious and that he tried to get the defendant to relax and always asked if any promises were made to the person being sentenced. He testified that he would not let the attorney answer for the defendant when asking if a plea was voluntary because it was "my responsibility" and he went along as if he did not know what other judges had done (R.T. 250-255). He stated that his general practice in such cases was to make sure the defendant understood the charges and consequences of a guilty plea, and that after addressing the defendant personally, he would question his attorney to check more (R.T. pp. 241-243). Petitioner testified that he pleaded guilty because he wanted hospital treatment not just because of what his father had said (R.T. 171) and that when the State Hospital returned him to prison (because of its decision, it could not

help him), he went to the superintendent and told him the decision was wrong and that he still needed treatment (R.T. 178-179). Appellant also testified that the guilty plea was "a decision that had to be made" because (1) there was no other place for him to go, and (2) to avoid the death penalty (R.T. 179-180).

He did not think about his plea and its voluntariness until after he talked to the "jailhouse lawyers" at the State Prison (R.T. 181).

In addition, as respondent has shown, supra, that the petitioner received the effective assistance of counsel in making his guilty pleas.

Thus, respondent submits that the findings by the Courts below that petitioner's guilty pleas were voluntarily entered were supported by the record.

## ARGUMENT

### III

### THE CIRCUMSTANCES UNDER WHICH THE SUPREME COURT OF ARIZONA AFFIRMED BURCHETT'S CONVICTIONS DID NOT DENY HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

Under Article 6, Section 2 of the Arizona Constitution, the Arizona Supreme Court is given the power to sit in division or en banc with not less than three justices. It is, thus, apparent that the procedure of using only three justices to hear oral arguments is valid under the Arizona Constitution. Oral argument is not a constitutional imperative and petitioner was granted a chance to be heard with a quorum of the court. See Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964).

The United States Supreme Court has recognized that en banc proceedings are an in-

herent power of courts for unusual circumstances, and absent statutory regulations or other promulgated rules, courts may proceed en banc as they desire as long as they proceed consistently with due process. See generally United States v. American Foreign S.S. Corp., 363 U.S. 680, 688-690, 80 S.Ct. 1336, 1338-1339, 4 L.Ed. 1491, 1494-1495 (1960).

There are many other states that have rejected as without merit arguments similar to petitioner's. They hold that en banc proceedings require only a statutory quorum to proceed for the entire court, and that courts have inherent powers to regulate their procedures to go in division, en banc, or en banc through a quorum consistent with due process and equal protection. See, e.g., Nelson v. Union Wire Rope Corp., 39 Ill.App.2d 73, 135-136, 187 N.E.2d 425, 454 (1963); Wells v. Wells, 200 Pa.Super. 8, 10-11, 186 A.2d 844, 845 (1962);

Commonwealth v. Myers, 402 Pa. 202, 167 A.2d 274, 276 (1961); Bray v. Barry, 160 A.2d 577, 581 (Sup. Ct. R.I. 1960); Center School Dist. No. 58 of Jackson County v. Kenton, 345 S.W.2d 120, 129 (Sup. Ct. Mo. 1961); Fette v. City of St. Louis, 366 S.W.2d 446, 448-449 (Sup. Ct. Mo. 1963); Hoyt v. Hoyt, 351 S.W.2d 111, 114 (Ct. Civ. App. Tex. 1961).

Thus, respondent submits that the District Court was not clearly erroneous in rejecting petitioner's frivolous argument here, especially in light of the fact that the whole Arizona Supreme Court rejected his motion for rehearing en banc with all five justices.

## CONCLUSION

Respondent respectfully submits that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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